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Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

William J. Reinhart, Petitioner,	)	
v.	)	**6th Cir. No. 01-3283**
	)	**USDA No. 99-0013**
United States Dep't of Agriculture, Respondent.	)	

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

February 2003

37 pp

QUESTIONS

1. Whether the failure by the United States Department of Agriculture to serve Petitioner within the 30-day statutory time for appeal, resulting in Petitioner's appeal being filed beyond the 30-day period, is an issue of denial of due process on Petitioner or the denial of jurisdiction by the Sixth Circuit Court of Appeals for late filing not excused under the principle of equitable tolling? The only method of notification by the U.S.D.A. is by certified mail and no public docket is maintained.

2. Whether the United States Congress exceeded its authority under the Commerce Clause with passage of the Horse Protection Act (15 U.S.C. §§ 1821 - 1831)? This Act extends regulation under the commerce clause to an amateur recreational activity. The prohibited activity (namely, the exhibition of a "sore" horse) has no effect on interstate commerce, much less a substantial impact, the standard which this Court has established.

3. Whether the division between the Fifth and Sixth Circuits, United States Courts of Appeal, on the reliability of the method and evidence used by the United States Department of Agriculture constitutes a denial of equal protection of the law against Petitioner? The Fifth Circuit has ruled successively that the method and evidence which the U.S.D.A. presents in its prosecution of cases under the Horse Protection Act (palpation of a horse's feet) is not substantial or reliable evidence upon which a violation can be supported. The Sixth Circuit Court of Appeals apparently upholds the method and evidence of the U.S.D.A. (palpation of a horse's feet) as reliable and substantial. This is a clear division between the two most important circuits on the only method and evidence presented in these cases. Petitioner asks this Court to resolve this division so that citizens are accorded equal protection of the law.

PARTIES TO THE PROCEEDING:

William J. Reinhart and his wife Judith Reinhart breed, train and exhibit Tennessee walking horses as a retirement activity. They own all horses they train and exhibit. Prior to this retirement activity, William Reinhart:

EDUCATION: University of Alabama - 1957 - 1962
Bachelor of Arts Degree - Political Science/Economics - 1960
Masters of Arts Degree - Political Science/Economics - 1962
1 Year - University of Alabama School of Law

EXPERIENCE: Forty years working with state and local governments as well as state and national associations representing state and local government officials on intergovernmental relations:

> Intergovernmental advisor to the Governor of the State of Tennessee;
> Urban Development Coordinator and intergovernmental advisor to the Mayor of Metropolitan Nashville-Davidson County, Tennessee;
> Twenty years as Senior Intergovernmental Policy Consultant to the National League of Cities/U. S. Conference of Mayors;
> Intergovernmental policy advisor to the Tennessee Municipal League;
> Intergovernmental specialist on many projects with states and municipal governments and federal agencies.

The Respondent is the Secretary of the United States Department of Agriculture as represented by the Solicitor General of the United States.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities ..... iv - vi

Opinions Below 1

Statement of Basis for Jurisdiction 2

Constitutional and Statutory Provisions 3

Statement of Case 4

Jurisdiction 5

Constitutionality of the Horse Protection Act Under The Commerce Clause 14

Analysis - Constitutionality 18

Enforcement of the Horse Protection Act Under Existing Methods Is A Denial of Equal Protection of the Law Prohibited by the U. S. Constitution 23

Conclusion 30

TABLE OF AUTHORITIES

Page

Bobo v. United States Department of Agriculture
52 F.3d 1406 (6th Cir. 1995) 26, 27

David Tracy Bradshaw v. United States Dep't of Agriculture,
No. 00-60582 (U.S. Ct. of Appeals for the
5th Circuit, May 14, 2001) 5, 26, 29, 30

Brown V. Dir., Office of Workers' Comp. Programs,
864 F.2d 120, 124 (11th Cir. 1989) 8

Daubert v. Merrell Dow Pharmaceuticals, Inc.
509 U.S. 579 (1993) 28, 29

In re Delaney, 29 F.3d 516, 518 (9th Cir. 1994) 8

Elliott v. U.S.D.A.
990 F.2d 140, 145 (4th Cir. 1993) 27

Fleming v. U.S.D.A.
713 F.2d 179 (6th Cir. 1983) 27

Frye v. United States
54 App. D.C. 46, 47, 293 F.1013, 1014 28

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241, 252-253 (1964) 15

Hodel v. Virginia Surface Mining & Reclama. Assn., Inc.,
452 U.S. 264, 276-280 (1981) 15

Katzenbach v. McClung,
379 U.S. 294, 299-301 (1964) 15

Omni Capital Int'l v. Rudolf Wolff & Co.,
484 U.S. 97 (1987) 13

Perez v. United States,
402 U.S. 146, 155-158 (1971) 15

Polylok Corp. v. Manning,
793 F.2d 1318, 1320 (D.C. Cir. 1986) 8, 9

Stone, v. I.N.S.,
514 U.S. 386, 405 (1995) 7

United States Dep't Agric. v. Kelly,
38 F.3d 999, 10001-02 (8th Cir. 1994) 7

United States v. Alfonso Lopez,
S. Ct. 93-1260, April 1995) 4, 15, 16, 18, 19, 23

United States v. Morrison,
529 U.S. 598 (2000) 4, 16, 17, 18, 19, 23

United States v. Ziegler Bolt and Parts Company
95-1408, - 1419 (April 14, 1997) 13, 14

Bill Young & Floyd Sherman v. United States Dep't of Agric.,
53 F3.d 718 (5th Cir. 1995) 4, 21, 25, 26, 27, 30

Zurich Ins. Co. v. Wheeler,
838 F.2d 338, 340 (9th Cir. 1988) 9, 10

Constitutional Provisions, Statutes, Other:

U. S. Const., Art. I, § 8(3) 4, 14, 15, 16, 17, 18, 20, 22

U. S. Const., Art. V, Amendments 4, 12, 13, 14, 27

U. S. Const., Art. XIV, § 1, Amendments 4, 23, 26
Pub. Law No. 91-540, 84 Stat. 1404; 90 Stat. 914, 15 U.S.C.
§§1821 - 1831 ..... 4, 5, 6, 7, 12, 14, 15, 18, 19, 22,
23, 26, 27

Tennessee Code Annotated, §39, Ch. 14, Part 23 23

Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Institute by the Secretary (United States Department of Agriculture, Effective Date April 20, 1996) 6, 12

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit, No. 01-3283, issued on September 24, 2002, on a petition for rehearing en banc, is not reported, but is included in the Appendix hereto.

The opinion of the United States Court of Appeals for the Sixth Circuit, No. 01-3283, issued on July 10, 2002, was not recommended for publication but is included in the Appendix hereto.

An order of the United States Court of Appeals for the Sixth Circuit, No. 01-3283, issued on July 6, 2002, on the question of jurisdiction, is not reported, but is included in the Appendix hereto.

A stay order of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on June 20, 2001, is not reported but is included in the Appendix hereto.

The order denying William J. Reinhart's petition for reconsideration by the Judicial Officer of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on January 23, 2001, is reported at 60 Agric. Dec. ___ (Jan. 23, 2001) and is included in the Appendix hereto.

The decision and order of the Judicial Officer of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on November 9, 2000, is reported at 59 Agric. Dec.___, slip op. (Nov. 9, 2000) and is included in the Appendix hereto.

The decision and order of the Administrative Law Judge of the United States Department of Agriculture, HPA Docket No. 99-0013, issued on June 5, 2000, is not reported but is included in the Appendix hereto.

STATEMENT OF BASIS FOR JURISDICTION

The judgment of the Sixth Circuit Court of Appeals for the United States was entered on July 10, 2002. A petition for rehearing en banc was denied on September 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8(3).

United States Constitution, Article V, Amendments.

United States Constitution, Article XIV, § 1, Amendments.

Pub. Law 91-540, Dec. 9, 1970, 84 Stat. 1404: P.O. 94-360, July 13, 1976, 90 Stat. 915, 15 U.S.C. §§1821 - 1831, The Horse Protection Act.

Tennessee Code Annotated, Section 39, Chapter 14, Part 23.

STATEMENT OF CASE:

I. This is an appeal from the United States Sixth Circuit Court of Appeals' Opinion dated July 10, 2002, denying jurisdiction on the grounds that the Appeal was not timely filed, and the subsequent denial of a Petition to Rehear dated September 24, 2002. The reason for the "so-called" late filing was the admitted illegal action of the United States Department of Agriculture ("U.S.D.A."), which is the prosecuting agency of the Horse Protection Act (P.L. 91-540, Dec. 9, 1970, 84 Stat. 1404: P.O. 94-360, July 13, 1976, 90 Stat. 915, 15 U.S.C. §§1821 - 1831) ("H.P.A."), by failing to serve the Petitioner with its final action until 4 days after the statutory period for appeal under the H.P.A. had passed. This conduct constitutes prosecutorial misconduct and is a violation of Petitioner's due process rights under the U. S. Constitution, Article V.

The U. S. Sixth Circuit Court ignored the relevant cases briefed by Petitioner on the jurisdictional issues in this matter and relied instead upon cases dealing with equitable tolling of the time for appeal that are irrelevant in the present case as the following brief will show.

II. The substance of the Appeal grows out of a finding by the U.S.D.A. that Petitioner violated the Horse Protection Act. The substantive issues raised in the Appeal are as follows:

A. A first impression constitutional challenge (Art. I, §8(3)) to the Horse Protection Act, based on this Court's rulings in *United States v. Alfonso Lopez,* S. Ct. 93-1260, April 1995 and *United States v. Morrison*, 529 U.S. 598 (2000).

B. A constitutional challenge (Art. XIV, §1) under the Equal Protection Clause of the United States Constitution based on the U. S. Fifth Circuit Court of Appeals' rulings in

Bill Young and Floyd Sherman v. United States Department of Agriculture, 53 F.3d 728 (5th Cir. 1995) and *David Tracy Bradshaw v. United States Department of Agriculture*, No. 00-60582 (U. S. Court of Appeals for the Fifth Circuit, May 14, 2001) totally rejecting the reliability of the methods used by the U.S.D.A. in prosecuting cases under the H.P.A.

The illegal action of the U.S.D.A. by failing to follow the statute and properly serve Petitioner, is particularly egregious because employees of this executive branch agency (the U.S.D.A.), are the investigators, the prosecutors, the judge, and the jury. In the present case, by not properly serving Petitioner, the U.S.D.A. is exercising what amounts to a pocket veto of the requirement under the H.P.A. for judicial review. The decision of the Sixth Circuit Court condones these actions.

This is a prescription for the most dangerous tyranny which the American system faces. The regulation of more and more sectors of American life is being handled in the executive branch of government under administrative prosecutorial systems. The combination of prosecutorial, judicial and administrative functions in these systems are a departure from the wisdom of the Constitution which separates these powers into independent branches. The only justification for this system is the requirement for judicial review. In the present case, the illegal action of the administrative prosecuting agency has effectively annihilated the separation of powers safeguard. Petitioner asks this Court to protect this fundamental safeguard.

JURISDICTION

Facts in the Record

1. The Horse Protection Act provides that the time allowed for filing a Petition for Review with the Court of

Appeals from a Final Order of the Judicial Officer of the U.S.D.A. is 30 days.

2. The U.S.D.A. Judicial Officer signed the order denying the Petition for Reconsideration on January 23, 2001.

3. The Clerk of the U.S.D.A. sent, by certified mail, erroneous material to Petitioner which was received by Petitioner on February 5, 2001.

4. Petitioner immediately called the U.S.D.A. Clerk and advised her of the erroneous material and was instructed to return this material which Petitioner returned on February 7, 2001 by certified mail. Petitioner was also advised that no information was available on his case.

5. Petitioner received the correct order by certified mail on February 26, 2001, 34 days from the date the order denying Petition for Reconsideration was signed. All of the above facts on the exact dates are supported by receipts from the U.S. Postal Service.

6. Petitioner filed his notice of appeal within the 30 day period from receipt of the order denying Petition for Reconsideration.

7. The U.S.D.A. has adopted, under its rules of practice under the Horse Protection Act, service of process by certified mail. (§1.147. *Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary* (U. S. D. A., Effective Date April 20, 1996).

8. The Sixth Circuit Court of Appeals ruled that the appeal was not timely filed even though the U.S.D.A. admits that Petitioner did not receive the denial of his Petition for Reconsideration for 34 days. The U.S.D.A. completely controls its adopted method of service and the U.S.D.A.

maintains no public docket of its cases.

Dealing with these facts, the Sixth Circuit Court stated:

"The U.S.D.A., however, concedes that a clerical error on its part contributed to Reinhart's delay in filing his notice of appeal. Specifically, the U.S.D.A.'s Office of the Hearing Clerk mistakenly sent Reinhart a decision from a totally unrelated case rather than the order denying his petition for reconsideration. The record does not indicate when Reinhart received this decision, but the U.S.D.A. acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001. Reinhart did not receive this order until February 26, 2001, 34 days after the order was issued and 4 days after the time period for appealing that order had expired."

. . . .

"Only the Supreme Court or Congress can alter the current rule that prohibits equitable tolling under the circumstances of this case." **(Opinion, *William J. Reinhart v. United States Department of Agriculture*, No. 01-3283, United States Court of Appeals for the Sixth Circuit, July 10, 2002, p. 5)**

The Court and the U.S.D.A. cite several cases that purport to be controlling on the question of the time limit for filing an appeal in this case stating that such time limits are *". . . .mandatory and jurisdictional and not subject to equitable tolling."* (Id., *Reinhart*)

In the *Kelly* case, the only case decided under the time period for filing an appeal under the Horse Protection Act, Petitioner Kelly was served within six days of the date of the final order but sent his appeal to the wrong court and by the time it reached the proper court, was one day late and, hence, was untimely filed.

In *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995), the time for filing an appeal was 45 days. Petitioner Stone did not file an appeal within this time limit but instead filed a Petition for Reconsideration that took 17 months to conclude. The Court ruled that the Petition for Reconsideration did not toll the time for filing an appeal.

In *Brown v. Dir., Office of Workers' Comp. Programs,* 864 F.2d 120, 124 (11th Cir. 1989), appellant was served well within the period for filing an appeal. His notice of appeal was received one day late. Appellant argued for equitable tolling based on the date he mailed his appeal, eight days before the deadline, but received one day after the statutory period for filing. The Court ruled his notice of appeal was not timely filed.

In all of the above cases, appellants were served within the statutory period but, for a variety of reasons, were late in filing their appeals. These cases are all to be distinguished from the present case where Petitioner was not served within the statutory period for filing an appeal.

In its Opinion, the Sixth Circuit Court cites one case where there was no actual service by the clerk but appellant found out about the order, so there was notice. *In re Delaney,* 29 F.3d 516, 518 (9th Cir. 1994), appellant had 10 days from the date of entry to file an appeal under Bankruptcy Rule 8002(a). The notice of appeal was filed 13 days after the appeal time expired. Appellant argued that she was not served, but admitted she knew of the order. Here there was no actual service by the clerk but there was actual knowledge of the order. The court ruled the appeal was untimely filed and stated, *". . . . that if she had checked the docket sheet she would have determined the date of entry."* (*In re Delaney*, 29 F.3d 516, 518 (9th Cir. 1994))

The U.S.D.A. cites *Polylok Corp. v. Manning,* 793 F.2d

1318, 1320 (D.C. Cir. 1986), which deals with the rules for filing a timely notice of appeal. In that case the district court granted the defendants motion to dismiss on April 24, 1985. The order of dismissal was filed the next day, April 25. Defendants received notice of this order on April 26. *Polylok*, the plaintiff, asserts that it did not receive notice nor a copy of the court's order until July 10, 1985. The court said:

"The appellate rules require the potential appellant to file a notice of appeal with the district court clerk 'within 30 days after the date of entry of the judgment or order appealed from.' Fed. R. App. P.4(a)(1). The district court may extend this period to sixty days 'upon a showing of excusable neglect or good cause.' Fed. R. App. P. 4(a)(5). . . . In the normal course, prospective appellants have no difficulty satisfying Rule 4 because the rules also require that the clerk serve notice of the entry of an order or judgment by mail upon each party. . . ." **(*Polylok Corp. v. Manning,* 793 F.2d 1318, 1320 (D.C. Cir. 1986))**

In the present case, the Judicial Officer signed the order on January 23, 2001, and Petitioner received the erroneous material 13 days later on February 5, 2001 by certified mail. Immediately upon receipt of this material, Petitioner called the clerk on February 6, 2001, and the clerk said there was no information available on Petitioner's case. It then took the clerk an additional 10 days to mail the order denying the Petition for Reconsideration - a total elapsed time of 23 days before the order was even mailed. This time sequence does not meet the requirement that: *"Immediately upon entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party . . . . and shall make a note in the docket of the service."* (Fed. R. Civ. P. 77(d)

The decision by the 9th Circuit, not cited by this court nor the U.S.D.A., in *Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th

Cir. 1988) provided ample authority for the Sixth Circuit to take jurisdiction of this case even under the framework of equitable tolling. In *Zurich*, the court signed an order denying mortgagee's motion for a new trial and for amendment of the judgment:

"This order was signed by the court and entered on June 6, 1986. Notice of its entry, however, was not received by the Mortgagee. On July 9, 1986, counsel for the Mortgagee talked by telephone to the clerk of the court and was told that the order had not been entered. The Mortgagee learned of the entry of the order only on August 8, 1986. " (*Zurich Ins. Co. v. Wheeler*, 838 F.2d 338, 340 (9th Cir. 1988))

The telephone conversation between mortgagee and the clerk occurred 33 days after entry of the order. Mortgagee did not learn of the entry until August 8, an elapsed time of 62 days. In *Zurich*, the time for filing a notice of appeal was 30 days after the entry of judgment. Dealing with these proceedings, the court said as follows:

"[1] The failure of the clerk to give notice is not a ground, by itself, for a finding of excusable neglect, but is a factor to be considered along with other circumstances. Id. at 460. In this case, the clerk failed to give notice and then told counsel that the order had not been entered. Counsel exhibited sufficient diligence in checking with the clerk. His reliance on the clerk's representation was an excuse for failing to file within the prescribed time. There was no prejudice to the Insurer, especially as the trial judge had indicated at the hearing on the motion for a new trial his expectation that an appeal would be taken." (Id., *Zurich*)

In *Zurich*, mortgagee did not telephone the clerk for a period of 33 days after the order was entered, and, yet, the court did not place the total burden on the mortgagee to check the docket. In *Zurich*, since this was a decision by a

district court, there was a docket to check. In the present case, Petitioner telephoned the clerk within 13 days of the signing of the order and was told that no information was available on his case and there is no public docket to check.

The Sixth Circuit Court apparently mistakenly perceived this case as one of an untimely filing of an appeal not excused by equitable tolling. The only thing in the Sixth Circuit Court's opinion that attempts to rationalize its decision with the facts in this case is the following statement:

"Nevertheless, Reinhart neither checked the docket nor called the clerk to see if the Secretary had ruled on his petition for reconsideration." (Opinion, *William J. Reinhart v. United States Department of Agriculture*, No. 01-3283, United States Sixth Circuit Court of Appeals, July 10, 2002, p. 4).

This statement by the Court is in factual error on every point. First, there is no docket to check under the U.S.D.A. system; and secondly, Petitioner called the U.S.D.A. on February 6, 2001 and told the Clerk he had received material on a case that did not pertain to him. The Clerk advised that an obvious mistake had been made and to return the material. In the same telephone conversation, the Clerk advised Petitioner that no information was available on his case. In a different section of its opinion, the Court acknowledges this communication in the following language: *"....but the U.S.D.A. acknowledges that Reinhart notified it of the mistake and that the decision from his case was then sent out to him on February 15, 2001.* (Id. *Reinhart*). Further proof of this communication between Petitioner and the Clerk of the U.S.D.A. on February 6, 2001, is that in response to a direct question at oral argument, Petitioner told the Court that he did call the Clerk to notify her of the erroneous material and to check on the status of his case.

The above cases cited by the Sixth Circuit Court on

equitable tolling are in stark contrast to the case at bar. In every case cited, petitioners were served within the 30 day period in one form or another but were simply late in filing their appeals for different reasons. In the present case, Petitioner was never served with the opinion in his case in any form whatever and, in fact, was advised by the Clerk that no information was available on his case on February 6, 2001. Thus, the opinion of the Sixth Circuit Court places a burden on the Petitioner that is impossible to comply with since the U.S.D.A. does not maintain a public docket.

The Horse Protection Act is silent as to the method for service of process in the prosecution of cases under the H.P.A. The U.S.D.A. has adopted as its chosen method of service of process its published, *Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary* (United States Department of Agriculture, Effective Date April 20, 1996) which provides in relevant part that service of process is upon receipt by certified mail and the courts have ruled that service must be immediate.

This method was obviously chosen by the U.S.D.A. because the agency does not maintain a public docket of its cases as Federal courts are required to do. In its Brief for Respondent, the U.S.D.A. acknowledges that Petitioner's petition for review by the Sixth Circuit was timely filed:

***"Reinhart filed a petition for reconsideration of the Secretary's decision, and that petition was denied on January 23, 2001. A copy of the denial of the petition for reconsideration was served on Reinhart on February 28, 2001. Reinhart filed a timely petition for review with this Court on March 23, 2001."* (Id. *Reinhart*).**

This is controlling evidence that under the U.S.D.A. service of process system, there is no justification for not serving Petitioner within the 30 day period.

Petitioner has argued and briefed to the Sixth Circuit that this is not a case of equitable tolling on the late filing of an appeal but is simply a denial of due process because the U.S.D.A. did not serve Petitioner in any form during the 30 day period for an appeal. The U. S. Supreme Court said in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) that:

***"The requirement that a federal court has personal jurisdiction flows from the Due Process Clause of the Fifth Amendment of the U. S. Constitution. (Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).**

"An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action and brought under a court's authority by formal process. In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. (See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444--445 (1946)" (Supreme Court of the United States, No. 97-1909, Murphy Brothers, Inc., Petitioner v. Michetti Pipe Stringing, Inc., On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, [April 5, 1999]."

The issue in *Omni Capital* was whether a private cause of action existed under the Commodities Exchange Act on a foreign corporation. The court found that the act was silent about service of process. After reviewing all federal and state rules and cases, the Court could find no authority for jurisdiction. Hence, the claim against defendant was dismissed on constitutional grounds.

In the case of *United States v. Ziegler Bolt and Parts Company*, 95-1408, - 1419 (April 14, 1997), the court found that after several steps had transpired in the legal process petitioner had raised a proper defense of insufficient service from the beginning and the court dismissed the complaint against petitioner, stating: *". . . specifically, the court lacks personal jurisdiction over Ziegler and the complaint was barred because of insufficient service of process." (United States v. Ziegler Bolt and Parts Company*, 95-1408, - 1419 (April 14, 1997)). In *Ziegler*, the government served its process on defendant's attorney instead of the defendant directly or on any member of the company who was authorized under the rules to accept service. The court ruled that even after several stages of the prosecution had gone forward, the government's failure to meet the requirement of proper service of process was a violation of the constitutional requirement for due process and sustained a dismissal of the complaint.

Petitioner believes that these cases are clear and on point, namely, that the United States government must satisfy the procedural requirement of service of process at every step of its complaint. In the present case, the U.S.D.A. failed to do so and thereby forfeits the government's jurisdiction in this case. Because of the pleadings below, the U.S.D.A. was put on notice that an appeal was to be expected on constitutional grounds. The requirement of service of process in this case under the authority cited above argues for the dismissal of this complaint and the award of damages to Petitioner for all costs incurred after the failure of the U.S.D.A. to meet its requirement for service of process, and was so pled to the Sixth Circuit Court of Appeals.

While Petitioner believes that he has set forth the proper resolution of this case, in the event this Court finds a way to hear the constitutional arguments in this case, the constitutional arguments are presented herein.

Constitutionality of the Horse Protection Act Under the Commerce Clause of the United States Constitution

Petitioner has argued throughout these proceedings that the Horse Protection Act (15 U.S.C. §§ 1821-1831) is an unconstitutional exercise of power by Congress and all activities of the Secretary of Agriculture in enforcing this Act are without legal authority. This Act was passed under the Commerce Clause of the U. S. Constitution (Art. I, § 8(3)). Section 3, (3) and (4) of the Act state:

"(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this Act are either in interstate or foreign commerce or substantially affect such commerce;"

The regulated activity under the Horse Protection Act, 15 U.S.C. §1825 (b)(2) is:

"(a) showing or exhibiting in any horse show or horse exhibition of any horse which is sore; and

(b) entering for the purpose of showing or exhibiting in any horse show or horse exhibition any horse which is sore."

Nowhere in the legislative history of the Horse Protection Act nor in the Act itself is there ever a connection between the regulated activity and the effect of the regulated activity on commerce.

In *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-158 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964), the Courts have said that

both in the legislative background and in the substance of the Act, Congress is required to justify by quantitative information and rational analysis the basis of its actions under the Commerce Clause of the U. S. Constitution. In the substance of the Horse Protection Act and in its legislative history, there is no quantitative information and no rational analysis that showing or exhibiting a sore horse has anything to do with interstate commerce. In *United States v. Lopez* (S. Ct. 93-1260, April 1995) and *United States v. Morrison*, 529 U.S. 598 (2000), after reviewing the entire history of the Supreme Court's decisions under the Commerce Clause, the Court stated: *"We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially effects interstate commerce.'"*

The U.S.D.A., in its Brief to the Sixth Circuit, advances the following arguments to support the constitutionality of the Horse Protection Act under the Commerce Clause:

"There are three broad categories of activity that Congress may regulate under its commerce power: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) those activities having a substantial relation to interstate commerce. United States v. Napier, 233 F.3d 394, 399 (6th Cir. 2000), citing Morrison, 529 U.S. at 609. The HPA clearly intends to regulate under the third category, so the Supreme Court's analytical framework under United States v. Lopez, 514 U.S. 549 (1995) and its progeny Morrison come into play.

. . . .

The major Tennessee Walking Horse shows, including the Trainers Show and the National Celebration, attract as competitors horse owners and trainers from around the country. The show class in which "Double Pride Lady" was

entered featured 13 horses owned by persons living in five different states (CR-29 CX 3). Twelve of the 13 horses were trained and shown by persons other than their owners. Id. It is frankly incredible that Reinhart now asserts that the HPA does not regulate a (sic) economic activity which affects interstate commerce.

When it enacted the HPA, Congress found that the exhibition of Tennessee Walking Horses substantially affected interstate commerce. 15 U.S.C. § 1822. In particular, Congress found:

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce. Id. In the legislative history of the HPA, Congress observed that Tennessee Walking horses number over 25,000, that champion Tennessee Walking Horses are particularly valuable as studs, and that if a champion is created by soring, that practice may actually weaken the breed's ability to walk in its distinctive fashion. H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 4 (1970), reprinted in 1970 U.S.C.C.A.N. 4870, 4871. The Supreme Court suggested that four questions be raised in deciding a Commerce Clause controversy:

1) Is the prohibited activity commercial or economic in nature?;

2) Is there an express jurisdictional element involving

interstate activity which might limit the statute's reach?;

3) Did Congress make findings about the effects of the prohibited conduct on interstate commerce?; and

4) Is the link between the prohibited activity and the effect on interstate commerce attenuated?

Corp. 236 at 329, citing Morrison, 529 U.S. at 610-623. Here, the prohibited activity - entering a sore horse in a horse show - is a commercial or economic activity. Substantial commerce exists in the selling, purchasing, training, transporting, and exhibiting of Tennessee Walking Horses. Much more than a cheap blue ribbon is involved.[1] *Congress found that entering and exhibiting sore horses results in unfair competition and could ultimately damage the integrity of the breed. Although Congressional findings, standing alone, are not sufficient to sustain the Constitutionality of legislation, Morrison, 529 U.S. at 614, the economic activities engaged in by Reinhart, his wife, and his trainer are solid further evidence that the exhibition of Tennessee Walking Horses is an economic activity of some size. Multiply this by over 25,000 horses, and the economic activity regulated by the HPA is of sufficient magnitude to sustain the constitutionality of this legislation. In addition, the link between entering sore horses in horse shows and the effect on interstate commerce is not attenuated, but rather it is direct and immediate. Unlike in Lopez, where the link between gun possession and interstate commerce was remote, the HPA proscribes entering sore horses in the very exhibitions which are regulated. This statute directly regulates a substantial economic activity (horse shows), and the direct link between soring horses and unfair*

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[1] Most prizes for winning competitors at the Trainers Show are in the $75-$150 range. However, the top prize for the championship event (Class 94) is $1,750.00 (CR-29 CX 1). All prizes in that one event class total $10,000. (*On Petition for Review of an Order of the Secretary, United States Department of Agriculture, Brief for the Respondent,* May 2001, p. 24)

competition at the exhibitions is the basis of the legislation. " (*On Petition For Review of an Order of the Secretary, United States Department of Agriculture, Brief for the Respondent*, May 2001, pp. 21, 22-25)

Analysis - Constitutionality

First, there is agreement that the constitutionality of the Horse Protection Act must be determined under the legal framework of *Lopez* and *Morrison* which require a substantial effects test on interstate commerce of the regulated activity. In this case, the regulated activity is, as plainly stated in the statute, the showing or exhibiting of a sore horse. The record in this case shows that the government advances three arguments:

1. *That the horse show under which this case arose featured 13 horses owned by persons in five different states.* Petitioner argues that interstate participation is completely irrelevant to the substantial effects test of *Lopez* and *Morrison*. Based on the level of interstate participation in this event, which featured over 1,000 entries, every human and animal event in the country could justifiably be regulated under the Commerce Clause. Apparently, the U.S.D.A. here is confusing cases decided by the courts which have properly ruled that interstate carriers and interstate public facilities are subject to federal regulation. There has never been in this record a claim that horses are a means of interstate transportation. Beyond this, in that section of the U.S.D.A. brief cited above the government has agreed that the Horse Protection Act comes under the substantial effects test of *Lopez* and *Morrison.*

2. *That champion Tennessee Walking Horses are valuable as studs and that if a champion is created by soring, this practice may actually weaken the breed's ability to walk in its distinctive fashion.* This bizarre argument places the U. S.

Congress in the role of protector of the integrity of a breed of horses and has nothing to do with the substantial effects test. Beyond this, the plain wording is layer after layer of uninformed speculation and is based on a simplistic understanding of horse breeding.

Under the U.S.D.A.'s argument about horse breeding, in the thoroughbred world the greatest thoroughbred horse in the past 100 years, and perhaps ever, was Secretariat. He was proclaimed by knowledgeable horsemen as the most natural running horse they had ever seen, requiring virtually no training. Despite this, as a stud Secretariat produced no stallions of any consequence and only a few mares which were of modest quality. This statement as a basis for regulation under the Commerce Clause demonstrates the degree to which the U.S.D.A. will attempt to expand its power. Petitioner argues that protecting the integrity of the Tennessee walking horse is the responsibility of owners and breeders of these horses.

3. *Tennessee Walking Horses are an economic activity of some size. Multiply this effect by 25,000 and the economic activity regulated by the H.P.A. is of sufficient magnitude to sustain the constitutionality of this legislation.* First, of the 25,000 Tennessee walking horses cited by the U.S.D.A., only about five percent of these horses are shown or exhibited. Beyond this, the argument about the size of the Tennessee walking horse registry has nothing to do with the substantial effects test. The size of an enterprise is not a triggering mechanism for regulation under the Commerce Clause.

Tennessee walking horse show activity must immediately be distinguished from the economic activity generated by other horse breeds. In thoroughbred and some quarter horse racing, pari-mutual betting is the basis of substantial economic effect, yet, state horse racing commissions, not the Federal government, regulate horse

racing activities, establishing standards for competition. The rules vary in thoroughbred horse racing between states where some states allow certain drugs (i.e., lasix) to be used while in other states the same drug is prohibited. Showing Tennessee walking horses is an activity largely regional in nature and follows the model that exists for all amateur human and animal competitions such as dog shows, amateur golf tournaments, car shows, beauty contests, etc. That is, an entry fee is required for participation and ribbons and cash awards are given to the top performers. In the typical walking horse show, an entry fee of $25.00 is normal and prize money, normally $50.00, is awarded to the top performers.

The overwhelming majority of walking horse shows are sponsored by charitable and civic organizations where the proceeds from concessions are used to support community charitable and civic activities. Approximately 80% of all horses in these shows are shown by amateur riders who own the horses. The motivation for participation in this activity is not a profit motive. The expense of preparing a horse for these competitions - veterinary bills, feed, tack, training, etc. - always exceed any winnings from showing a horse. There has never been an instance where a horse owner has made a profit from prize money in showing a Tennessee walking horse. Exhibiting Tennessee walking horses is a purely recreational activity. In the words of an announcer of the Tennessee Walking Horse National Celebration horse show, showing horses is among the last vestiges of the agrarian society of this country.

The culture of Tennessee walking horse shows is a family-oriented activity. Children as young as five years old exhibit these horses and senior citizens as old as 90 show their horses. The culture of Tennessee walking horse shows is more akin to the culture associated with the exhibition of animals at county fairs and, in fact, many walking horse shows are

held in conjunction with county fairs. It is not substantially different from horse shows in Scotland, Ireland, England and other countries including horse shows in the Arabic world where horses are simply shown for bragging rights and not for money.

In its arguments, the U.S.D.A. exaggerates the economic effect of horse activity under the mistaken notion that this has anything to do with the substantial effects test. At oral argument in the present case, the U.S.D.A. attorney aggregated the total economic effect of all horse breeds, which includes feed, veterinary services, tack, etc., in an attempt to make the court believe this is some gigantic economic enterprise. Tennessee walking horses constitute only a small percentage of the total horse population of the United States. More fundamentally, Petitioner believes that the U.S.D.A. does not understand the substantial effects test. The test is not the size of the economic enterprise within which the regulated activity occurs - in this case horse shows - but, the regulated activity itself - the showing or exhibiting of a sore horse. In summary, none of these arguments by the U.S.D.A. make even a remote connection between the regulated activity - the exhibiting or showing of a sore horse - and this activity's substantial effect on interstate commerce.

The horse shows in question in this case are based on the model for virtually all animal and amateur human athletic events. If this model comes within regulation under the Commerce Clause, then all dog shows, Sunday amateur golf tournaments, car shows, beauty contests, etc., would all be subjected to federal regulation. Congress would simply have to declare, without any basis, that there was some unfair practice occurring in any of these events which adversely affects interstate commerce.

The plain wording of the Horse Protection Act argues that this Act is not about the regulation of interstate

commerce at all. Section 3 (1) states that: *"the soring of horses is cruel and inhumane".* In Section 2 (D), a sore horse is defined as one on which some irritating or blistering agent or some other practice has been performed *". . . .where such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving. . . ."* The findings from a palpation examination by a U.S.D.A. veterinarian is whether he/she believes that the horse would be in pain if the horse were allowed to be shown. The Congressional findings and definitions plainly argue that the Horse Protection Act is a Federal cruelty to animals statute since no connection to interstate commerce is established. Petitioner argues this is what the Act is, but does not believe this is a Federal function.

The H.P.A., passed in 1976, usurped, with identical language, the Tennessee law which was enacted in 1963, (*Tennessee Code Annotated*, Section 39, Chapter 14, Part 2), with one notable exception. That is, the Tennessee law provided for a trial in a court in the independent judicial branch with prosecution by an independent prosecutor. Other states had similar laws. There is no argument in the Congressional Record that Tennessee or other states were improperly enforcing their own laws. In the H.P.A., Congress simply created a Federal offense which was already prohibited by state law. This Court rejected this exercise of Congressional power in both *Lopez* and *Morrison*. The H.P.A. is yet another example of Congress appropriating state police power under the guise of regulating commerce. If this Court can defer to the states to provide a remedy to the rape and other offenses graphically presented in the *Morrison* case, surely it can agree that, under our system, the states can provide a remedy for soring a horse.

<u>Enforcement of the Horse Protection Act Under Existing Methods is a Denial of Equal Protection of the Law Prohibited by the United States Constitution</u> (Article XIV)

The record in this case shows that the present method adopted by the U.S.D.A. for detecting sore horses is the palpation of the pastern area of a horse's foot. In this procedure, one front foot of the horse is picked up and the pastern area is pressed upon with the fingers of the inspector and, if the horse moves its foot in response to this pressure, the horse is deemed to be sore. This palpation examination is conducted by a U.S.D.A. veterinarian and is the evidence used in the prosecution of these cases. This method was adopted by the U.S.D.A. over the objection of the walking horse community in general and specifically, the leading equine veterinarians as represented in the published document, *The Atlanta Protocol.* The U.S.D.A. is so committed to this method for detecting sore horses it gives no weight to the evidence of other methods for detecting a sore horse.

At the administrative hearing Petitioner presented Charles Thomas, the senior member of the National Horse Show Commission[2], as a defense witness. Mr. Thomas testified that he checked Petitioner's horse while the horse was being ridden in its normal gaits with action devices 10 minutes before the palpation examination by the U.S.D.A. veterinarians and concluded that the horse was not sore. The method of checking a horse with action devices while being ridden is considered by knowledgeable horsemen as the most stringent test to determine if a horse exhibits pain or an exaggerated gait due to soreness. The Administrative Law Judge in the following statement from his Decision and Order completely rejects the evidence of Charles Thomas in the following statement:

2The National Horse Show Commission is an industry organization. The staff of the organization checks every horse at every show. The U.S.D.A. checks horses at certain shows selected on a random basis.

"He merely viewed Double Pride Lady but did not palpate her. He, along with Respondent's two other witnesses, was of the opinion that the horse was not sore at the time. This evidence of Respondent fails to rebut the testimony of the two DQPs and two VMOs stationed at the show who found problems with the horse after they had palpated her. " **(Decision and Order, HPA Docket No. 99-0013, June 5, 2000, p. 8)**

In short, the only evidence the U.S.D.A. will accept is based on its adopted method of palpating the horse's pastern area. On Defendants' appeal to the Fifth Circuit Court of Appeals in *Bill Young and Floyd Sherman v. United States Dep't of Agriculture*, 53 F3.d 728 (5th Cir. 1995), the U.S.D.A. was called upon to defend its adopted method. The Court said:

"The reliability of the veterinarians' conclusions recorded in the hearsay documents, based almost exclusively on the results of digital palpation, are also called into question by significant evidence presented at the hearing supporting the conclusion that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. Several highly qualified expert witnesses for the petitioners testified that soring could not be diagnosed through palpation alone. Petitioners also offered a written protocol signed by a group of prominent veterinarians coming to the same conclusion. The JO's basis for rejecting this evidence seems to be simply that it is contrary to the agency's policies and the agency's prior decisions (2) The JO does not point to scientific or medical data supporting the agency's chosen diagnostic technique. See Veal v. Bowen, 833 F.2d 693, 699 (7th Cir. 1987) (holding that '[w]here diagnoses are not supported by medically acceptable clinical and laboratory diagnostic techniques, this court need not accord such diagnoses great weight')." **(Id. *Young*)**

After the decision of the Fifth Circuit in *Young* in

1995, the present case was instituted against Petitioner in 1998 relying on the exact method and evidence presented in the *Young* case. In his brief, Petitioner presented the decision of the Fifth Circuit in *Young*, which rejected the palpation method as unreliable. The U.S.D.A., in its brief, dismissed that decision and that court as *"a derelict on the waters of the law."* During the course of litigation of the present case, a second case was appealed to the Fifth Circuit and again the U.S.D.A. had to defend its chosen method of palpation in detecting sore horses. The Fifth Circuit said again:

***"In Bill Young and Floyd Sherman v. United States Dep't of Agriculture, 53 F3.d 728 (5th Cir. 1995), we determined that a diagnosis of soreness based solely on digital palpation was not substantial evidence sufficient to support a violation of the Horse Protection Act.... Although counsel for the DOA attempted to distinguish Young, counsel conceded that there was little other evidence in the record besides digital palpation to support the finding of 'soring'. The DOA's determination was thus not supported by 'substantial evidence.'"* (*David Tracy Bradshaw v. U.S. Dep't of Agric.*, 59 Agric. Dec. 228 (2000))**

The Horse Protection Act was passed without jurisdictional limitations. It has nationwide jurisdiction. Thus, the enforcement of this law in the Sixth Circuit Court of Appeals based on exactly the same methods and evidence which have twice been rejected by the Fifth Circuit as not being *"substantial evidence sufficient to support a violation of the Horse Protection Act"* (Id. *Bradshaw*) is a denial of equal protection of the law to Petitioner. This contention is not speculative in light of the following statement by the Sixth Circuit Court in the present case:

"Finally, if it is of any consolation to Reinhart, we would not have been inclined to set aside the Secretary's order even if we had jurisdiction to hear his appeal. The Secretary's

finding that Reinhart violated the HPA appears to be supported by substantial evidence, particularly in light of the fact that this court has specifically held that a finding of soreness for the purposes of the HPA may be based solely upon the results of palpation. Bobo v. U.S. Dep't of Agric., 52 F.3d 1406, 1413 (6th Cir. 1995). . . . . In any event, the merits of his case are not properly before us in light of the untimely appeal." **(Id. *Reinhart*)**

While this is dicta, it shows that the Opinion of this panel of the Sixth Circuit Court of Appeals is in direct conflict with the Fifth Circuit's rulings on palpation as a method for detecting soreness under the Horse Protection Act.

In *Bobo v. United States Department of Agriculture*, 52 F.3d 1406, 1411-13 (6th Cir. 1995), petitioner presented evidence that his horse did not palpate well because of the horse's unruly and fractious nature but did not challenge the method itself. The palpation method has been challenged in the Fourth Circuit and the Sixth Circuit on the argument that the subjective nature of palpation is a denial of due process, *Elliott v. U.S.D.A.*, 990 F.2d 140, 145 (4th Cir. 1993) and *Fleming v. U.S.D.A.*, 713 F.2d 179 (6th Cir. 1983). The arguments in both of these cases was that the amount of pressure applied to the horse's pastern area would vary among different examiners, that is, one examiner could apply more pressure and get a reaction when another examiner could apply less pressure on the same horse and get no reaction. Both the Fourth and Sixth Circuits have held that these arguments were not sufficient and that the subjective nature of palpation does not deny due process (Id. *Elliott* and *Fleming*).

It is clear that there is an inconsistency between the Federal Circuits on whether palpation is substantial evidence to support a violation of the Horse Protection Act. The cases in the Fourth and Sixth Circuits have been on limited

challenges to the method. In *Young*, the Court considered all arguments for and against the palpation method. Petitioners presented expert witnesses who testified that the method was not reliable. Petitioners also presented a written document, The Atlanta Protocol, signed by leading equine veterinarians in the United States, dealing specifically with the method of palpation. This document concluded that palpation alone was not a reliable method. The Fifth Circuit heard arguments from the U.S.D.A. whether the palpation method was supported by any medically acceptable clinical and laboratory diagnostic techniques. The U.S.D.A. could supply no such basis for its method. In the present case, faced with the decisions in the Fifth Circuit and in response to a question from the Sixth Circuit panel, counsel for the U.S.D.A. offered the following: *". . . .palpation is such a well recognized medical technique that to require the department to give some scientific or clinical justification for its use would be analogous to making the department prove that on an uncloudy day the sky is blue."* (From tape of oral argument, *Reinhart v. U.S. Dept. of Agriculture,* June 21, 2002)

The Fifth Circuit Court, in *David Tracy Bradshaw v. U.S. Dep't of Agric.*, 59 Agric. Dec. 228 (2000), again heard all of the above evidence and, in addition, was presented evidence by the petitioner on what is acceptable evidence by expert witnesses in a federal trial.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), the U. S. Supreme Court ruled that the Federal Rules of Practice provide the standard for admitting expert scientific testimony in a federal trial. These Rules, according to the Court, superseded the holding in *Frye v. United States,* 54 App. D.C. 46, 47, 293 F. 1013, 1014, that: *"....expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community."*

The Court said further that:

"The trial court is to be guided by Rule 702 of the Federal Rules of Evidence in this regard which provides as follows:

(b) The Rules - especially Rule 702 - place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to "scientific . . . knowledge," since the adjective "scientific" implies a grounding in science's methods and procedures, while the word "knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance by demanding a valid scientific connection to the admissibility." Pp. 9-12.

These Rules place an affirmative burden of proof on whether the witnesses testimony is supported by underlying reasoning or scientific methodology. Quoting further from *Daubert:*

"(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquire, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation and whether it has attracted widespread acceptance within a relevant

scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. " Pp. 12-15. (Id. Daubert). **This holding of the Court in *Daubert* was extended in *Kumho Tire Co., Ltd., et al. v. Carmichael et al.*, No. 97-1709, United States Court of Appeals for the Eleventh Circuit, March 23, 1999, as follows: *"1. The Daubert factors may apply to the testimony of engineers and other experts who are not scientists." Pp. 7-13.***

The *Young* and *Bradshaw* cases deal directly with all of the issues in a fundamental challenge to the palpation method. The Fifth Circuit Court's treatment of the issue is comprehensive and relies on the scientific and clinical underpinning of the method and all applicable federal cases dealing with rules of evidence. Additionally, the Fifth Circuit decided *Young* in 1995 and *Bradshaw* in 2001. The U.S.D.A. had opportunity in both cases to defend its method and it could not. For all of the reasons stated above, the *Young* and *Bradshaw* cases are the most comprehensive and best reasoned cases and should be the basis for this Court resolving the conflict between Federal Districts.

CONCLUSION

For the reasons set forth, the petition for certiorari should be granted.

Respectfully submitted,

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